The future of the UK competition enforcement regime–more food for thought for the CMA?

Competition Law in Edinburgh

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Spring 2014 is getting closer and closer: this is the time in which, according to the UK Government timetable, the Competition and Markets Authority will be fully operational. The change will be momentous and very challenging: combining the functions hitherto performed by two bodies, i.e. the OFT and the Competition Commission will be no doubt fraught with difficulties, if anything in terms of internal organisation and workload. However, this far-reaching reform is not the only one that is mooted for the competition public enforcement framework in Britain. The recent consultation paper on 'Streamlining regulatory and competition appeals' (see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/229758/bis-13-876-regulatory-and-competition-appeals-revised.pdf) touches upon a key aspect of the public enforcement mechanism established by the Competition Act 1998, namely the scope of the power of judicial review that the Competition Appeals Tribunal (CAT) can exercise on infringement decisions. As is well known, the Tribunal enjoys powers of judicial control on the merits when it comes to these measures: this means that it can conduct a full inquiry, extending to all aspects of the decision being challenged and most importantly encompassing the merits and the facts of the decision. This feature of the UK public competition enforcement machinery has enjoyed widespread recognition as a strong safeguard of the due process rights of the parties subjected to OFT investigations: the jurisdiction 'on the merits' represents perhaps the most effective tool with which the fairness of "composite" criminal proceedings–i.e. proceedings in which the judicial control of a decision adopted in respect of a substantially "criminal charge" follows an administrative phase before an "integrated agency"–can be secured. In a recent speech (see: http://catribunal.org.uk/247-8158/Reforming-the-UK-Competition-Regime–assessing-the-impact-of-new-legislation-and-challenges-ahead-for-the-CMA.html) Sir Gerald Barling, chair to the CAT, emphasised the importance of the "full review on the merits" and in particular highlighted how this standard of review had received a full seal of approval from Government itself just a year ago, in the response to the Consultation on competition damages and collective redress.

Against this background, it is certainly surprising that in the recent consultation document on regulatory and competition appeals the Government has brought this issue of the opportunity and necessity of a "review on the merits" back in discussion: the Consultation Paper suggests that bringing the scope of review of competition decision "in line" with appeals in other sector and thereby limit the review on the merits only to the part of the decision fixing a penalty would be beneficial for "consistency" across regulatory sectors. It also hints at the fact that appeals should focus more on identifying decisions marred by "material errors" and be informed by principles of cost effectiveness and accessibility. Perhaps more importantly, and more worryingly in fact, the Consultation seems to suggest that the rules governing appeals before the CAT should restrict access to the tribunal only in cases in which "new evidence" that has just become available at appeal stage has would have justified a different outcome at administrative level. But is removing the "review on the merits" the best way of achieving these goals? And more generally, is the appeal process all about ensuring that the facts are correctly stated, or should it pursue wider and more overarching goals, such as securing fairness for the parties and the sound exercise of public powers? It is further argued, as the chairman of the CAT suggests, that the Government's proposal seem to overlook the fact that the Tribunal itself enjoys incisive case management powers and consistently exercises them to admit any evidence which was not available to the administrative authorities and which "the interest of justice" justifies introducing at appeal stage. So who is right? Is the Government justified in pursuing these goals of consistency across the regulatory spectrum, purportedly to "streamline" and make more

accessible the competition appeals route, even if these outcomes are de facto achieved at the cost of limiting rather drastically the right of the investigated parties to see that criminal charges made against them are dealt with fairly?

Sir Barling is certainly right to be concerned at these proposals: the experience of the CAT has shown that competition appeals can be heard efficiently and quickly as well as fairly. In this respect, the proposals tabled by the Government itself at the start of 2013 (see: https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/70185/13-501-private-actions-in-competition-law-a-consultation-on-options-for-reform-government-response1.pdf) and concerning private antitrust claims should have been seen as a vote of confidence for the Tribunal. The BIS response, in fact, called for a wider jurisdiction being recognised to the CAT, by allowing it to hear standalone claims and (except in Scotland) grant injunctions.

It should also be emphasised that since its inception the Competition Appeals Tribunal has been heralded as an example of how the demands of effective enforcement, ostensibly pursued by the "integrated agency" model, can be reconciled with the need to respect the requirements of due process enshrined in human rights principles and especially in the right to a "fair trial" and to a "fair non judicial procedure", protected by, inter alia, the European Convention on Human Rights. Antitrust infringements are "criminal in nature"–this much is now established. And this brings with it as an inevitable consequence that each decision finding such infringements should be subjected to a "full review", encompassing matters of fact and of law, including a review on the merits. This is exactly what the CAT has been doing since its creation: according to the 1998 Competition Act, the Tribunal has the power, inter alia, to "remake any decision" that the OFT could have made and to review afresh impugned infringement measures.

Against this background, it is difficult to explain why the CAT, which should become "a major venue" for competition cases and so far has acted as the lynchpin of the overall fairness of the UK competition enforcement structure, should see its review powers significantly curtailed. It is argued that generic references to the need to maintain "uniformity" in appeal powers across the overall regulatory spectrum do not seem to provide a sufficiently strong justification for this choice. Furthermore, it may legitimately be queried whether a similar choice would be compatible with the Convention requirements, as incorporated in domestic law by the Human Rights Act.

Not long ago, the later Marion Symmons, a former chair to the CAT, defined the "jurisdiction on the merits" enjoyed by the Tribunal as a means through which the overall competition enforcement framework established in 1998 could be "Convention-proofed". Today, the Government seems to be rather unconcerned at the possibility that this guarantee of conformity could be done away with: it is however rather doubtful that a justification based on "administrative efficiency" could support such a radical and criticisable choice.
